Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES AND DANA DAVEY,

Petitioners,

v.

ROBERT AND SHARON PRATT,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Washington, Division III

PETITION FOR WRIT OF CERTIORARI

JAMES DAVEY AND DANA DAVEY
Pro se Petitioners
3720 W. Rosamond Ave.
Spokane, WA 99224
(509) 879-7454

QUESTIONS PRESENTED

Petitioners were named as defendants in a real estate contract dispute concerning their home of 20 years. Appearing *pro se* at a show cause hearing for specific performance, petitioners requested a trial due to the multitude of disputed facts, and also requested discovery five times. Petitioners' request for trial was denied. The trial court then transformed the show cause hearing into a trial without notice to the petitioners, in direct violation of state court rules. At trial, the court ignored four additional requests for discovery, and made repeated references to "running out of time" over the course of the trial.

The questions presented are:

1. Whether a court's actions – forcing petitioners to trial without notice, denying them any and all discovery, ignoring state court rules, and imposing time constraints on the trial – against *pro se* parties amounts to an unfair trial in violation of the Due Process Clause of the Fourteenth Amendment.

2. Whether the court's actions, as described above, against *pro se* parties amounts to judicial bias in violation of the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, James and Dana Davey, respectfully petition for a writ of certiorari in this case to review the judgment of the Washington State Court of Appeals.

OPINIONS BELOW

The Washington State Supreme Court's order is unpublished and reproduced at App.28. The Washington State Court of Appeals' opinion is unpublished and reproduced at App.1. The oral ruling from the Spokane County Superior Court is unpublished and reproduced at App.16.

JURISDICTION

The Washington State Supreme Court issued its decision on September 8, 2009. The Court granted an extension of time to file the petition for writ of certiorari to January 7, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourteenth Amendment to the United States Constitution provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The State of Washington Court Rule 26(b)(1) provides:

> In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT

This Court has noted that while extreme cases often "test the bounds of established legal principles," they also often cross constitutional limits requiring the "Court's intervention and formulation of objective

standards. This is particularly true when due process is violated." *Caperton et al. v. A.T. Massey Coal Inc., et al.*, 556 U.S. ___ (2009), slip op., at 17. This case presents the Court with another extreme case of judicial bias, here, bias against a *pro se* party. Indeed, it is difficult to imagine a more extreme case of bias than the one presented here.

The petitioners were defendants in a dispute involving their home of 20 years. The petitioners proceeded *pro se*, and they possessed a due process right of access to the courts and to judicial impartiality. *See c.f.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Tumey v. Ohio*, 273 U.S. 510 (1927). The trial court thought otherwise. Rather than applying standard rules and state laws, the court rushed the *pro se* petitioners into a trial without notice, without discovery, and with no chance for a legitimate defense. The result was easy to predict; the petitioners lost their home.

The questions presented to this Court concern whether or not the *pro se* petitioners were given their due process right to a fundamentally fair proceeding. Because all parties – both attorney represented and *pro se* – are entitled to meaningful access to the courts and judicial impartiality, and since this Court has not previously provided guidance on the subject of judicial bias against *pro se* parties, review is warranted.

Petitioners James and Dana Davey were sued over a contract dispute involving their family home of

20 years. Petitioners were forced to go to trial without the benefit of discovery because the trial court refused to allow it. On September 19, 2007, in the Superior Court of Washington for Spokane County, Robert and Sharon Pratt sued the Daveys for specific performance of a real estate purchase and sale agreement and moved for an order to show cause and for shortening time. The show cause hearing why specific performance should not be ordered was held before Judge Ellen Clark on September 28, 2007, with the Daveys appearing *pro se*. The court indicated there were disputed facts demanding an evidentiary hearing. As a matter of fairness and due process since relevant witnesses refused to speak with or divulge information to him, Mr. Davey argued discovery should be allowed. The Pratts' counsel replied discovery was unnecessary. Refusing to rule on the discovery request and to set the case for trial, the court instead continued the show cause hearing to October 10, 2007.

The continued show cause hearing became a trial before Judge Robert Austin without notice to petitioners. During the trial and even in closing argument, Mr. Davey repeatedly asked the judge to allow discovery and stated with specificity what he expected to find. The court ignored the Daveys' discovery requests. In its findings of fact, the court struck this proposed language: "Defendants were not entitled to discovery." In so doing, the court tacitly acknowledged that its refusal to allow discovery to a *pro se* litigant was a denial of due process.

On appeal to the Washington Court of Appeals from an adverse judgment, the Daveys raised the issue that the trial court's refusal to allow discovery denied them due process. But the Commissioner did not address the issue in her ruling. Instead, she affirmed the judgment below by finding waiver, a theory not pleaded, argued, or proved at trial and not raised on appeal by either party. Deciding the case on a waiver theory precluded consideration on the merits of every issue, including the trial court's denial of due process by refusing to allow discovery, raised by the Daveys on appeal. Their motion to modify the ruling was denied on February 6, 2009.

In their petition for review to the Washington Supreme Court, the Daveys again raised the issue that the trial court's refusal to allow discovery was of constitutional magnitude as they were denied due process for the mere sake of expediency and because they were *pro se*. The petition for review was denied on September 8, 2009.

In each stage of the proceedings in the trial court and the appellate courts, the Daveys raised the federal due process question relating to the refusal to allow discovery. But each court refused to rule on the issue. The federal question was timely and properly raised and this Court has jurisdiction to review the judgment on a writ of certiorari.

Because all parties – both attorney represented and *pro se* – are entitled to meaningful access to the courts and judicial impartiality, and since this Court

has not previously provided guidance on the subject of a civil *pro se* litigants' right to discovery, notice of trial, and judicial bias against *pro se* parties, review is warranted.

REASONS FOR GRANTING THE PETITION

The Court's review is warranted for four reasons. First, this Court has never decided the question of whether civil *pro se* parties are entitled to discovery and notice of trial in accordance with the Due Process Clause of the Fourteenth Amendment. Second, this Court has never decided the question of whether judicial bias against *pro se* petitioners can rise to the level of a due process violation. Thus, the Court's guidance is needed. The question is undoubtedly important, given the rising number of *pro se* litigants in courts across the country. Third, the court of appeals' decision upholding the actions of the trial court conflicts with decisions of this Court. Finally, the trial court's actions constituted judicial bias in violation of the Due Process Clause.

I. This Court has never decided the question of whether civil *pro se* parties are entitled to discovery, and notice of trial in accordance with the Due Process Clause of the Fourteenth Amendment.

A. *Pro Se* litigants possess a due process right of equal justice and access to the courts.

Increasingly, both governmental and private organizations in virtually every state are concerned about *pro se* issues. Much of the national discussion has resulted in the creation and implementation of seminars and other educational tools that benefit *pro se* parties prior to and after commencing litigation. The reasons for this are many, and they center on the application of due process for civil *pro se* litigants.

The affirmation of *pro se* litigant due process rights can be traced back to several areas of our Constitution. They are guaranteed under our Fourteenth Amendment Equal Protection Clause, the Privileges and Immunities Clause in Article IV, Section 2, as well as the Fifth Amendment. Even so, civil *pro se* litigants are often treated disparately and discriminated against in our states' judicial systems.

The American Judicature Society conducted a study which concluded

> . . . judges surveyed for *Meeting the [Pro se] Challenge* were divided: some were annoyed by the presence of *Pro se* litigants, while

> others believed judges should help the self-represented receive a fair hearing by relaxing procedural rules. And although many respondents expressed a desire for formal policies to guide judicial behavior in *Pro se* cases, more than 90 percent of judges surveyed said their courts had no such protocols.[1]

It is clear that direction from the Supreme Court of the United States is needed to achieve consistency and fairness and "equal justice for all" within the state court system regarding trial notification, preparation time, and discovery rights for *pro se* litigants in civil matters.

The Court's opinion in *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142 (1907), affirms this sentiment. It stated, "It [the right to sue and defend oneself in court] is one of the highest and most essential privileges of citizenship . . . [and] [e]quality of treatment in this respect is not left to depend upon the comity between the states, but is granted and protected by the Federal Constitution." So, although equal rights in civil courts would appear to be undisputable based on the Court's rulings in criminal matters, "the Constitution contains no such explicit

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[1] Kathleen M. Sampson, "Meeting the *Pro se* Challenge: an update," American Judicature Society, http://www.ajs.org/prose/pro_sampson.asp.

right and the Court has not yet ruled on the precise question."[2]

"No State can deprive particular persons or classes of persons of equal and impartial justice under the law." *Caldwell v. Texas*, 137 U.S. 692 (1891). Although the Court has found that equal justice is a fundamental right under the Constitution, the reality is that *pro se* litigants are not consistently afforded this right in the state courts. In criminal cases, the Supreme Court has recognized the need for its intervention in states' mishandling of our constitutional due process rights and has ruled that

> under federal law, we should hold that denial of a federal constitutional right, no matter how unimportant, should automatically result in reversal of a conviction . . . [and] . . . with faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.

Chapman v. California, 386 U.S. 18 (1967). Again in *Griffin v. Illinois*, 351 U.S. 12, 16 (1956), this Court confronts the problem of "[p]roviding equal justice for poor and rich, weak and powerful alike." This same guidance is lacking, and sorely needed for civil cases

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[2] "Meeting the Challenge of Pro Se Litigation – A Report and Guidebook for Judges and Court Managers," American Judicature Society and State Justice Institute, 1998.

as well because, although, "[a]t its core, the right to due process reflects a fundamental value in our American constitutional system . . . [t]he Due Process Clause on which the Court relies has proven very elastic in the hands of judges." *Boddie v. Connecticut*, 401 U.S. 371 (1971).

The Supreme Court has made very clear at the federal and criminal level that Constitutional due process rights require that all litigants, regardless of their representation, be afforded equal protection and equal rights. However, in the absence of an authoritative ruling by the Supreme Court, the state system has no clear mandate as to how to achieve this same level of protection with regard to discovery and trial notice for civil *pro se* litigants.

In *Mullane v. Central Hanover*, Justice Jackson wrote, "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950). Justice Brennan's opinion in *Armstrong v. Manzo* argues that the equal protection clause should be applied to all due process situations.

> A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only

> forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' ... I see no constitutional distinction between appellants' attempts to enforce this statutory right [to a dissolution of marriage] and an attempt to vindicate any other right arising under federal or state law.... The right to be heard in some way at some time extends to all proceedings entertained by courts.

Armstrong v. Manzo, 380 U.S. 545 (1965).

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court maintained that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. In short, 'within the limits of practicability', a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie*, 401 U.S. at 379.

If the Court's rulings are to be realized, *pro se* litigants in state civil cases must be given proper and sufficient notice of a trial, adequate time to prepare for trial, and the opportunity to conduct discovery.

The Supreme Court has acknowledged that the application and enforcement of due process rights

continue to be a work in progress. For example, in *Boddie*, Justice Harlan stated that

> those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. *It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.*

(emphasis added).

This case provides an opportunity for the Court to "put flesh upon the due process principle," and make an enormous impact on the quality of justice served to civil *pro se* litigants throughout the 50 states.

B. The court's refusal to allow discovery prevented the petitioners' ability to prove their case, or to disprove the respondents'.

The right of access and broad right of discovery is necessary to adequately and effectively pursue a claim or defense. CR 26(b)(1). The right to access is implicated whenever a party seeks discovery and is limited in very few instances and for very specific reasons. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991). The petitioners made no less than nine separate requests for discovery, stating specifically what facts they expected discovery to reveal. They were refused every time.

The trial court's refusal to allow discovery is of great constitutional magnitude as the petitioners were denied due process for the mere sake of expediency and because they were *pro se*. *Pro se* litigants are generally held to the standard of an attorney. *Carver v. State*, 147 Wn. App. 567, 575, 197 P.3d 678 (2008). If the petitioners are to be held to such a standard, they should also be afforded the same right to discovery as an attorney. The court could not and would not have refused an attorney's request for discovery, but it would not rule on the petitioners' *pro se* requests, thereby denying discovery. Nowhere in the record is there any explanation offered by the court to justify its refusal to permit discovery. The trial judge recognized the impropriety of not allowing discovery because he deleted the proposed finding that "[d]efendants were

not entitled to discovery" even though he had ignored the petitioners' repeated requests to exercise the right. This refusal to allow discovery to a *pro se* litigant is a denial of due process and a significant constitutional question.

In his oral ruling, the trial judge stated, "to attack that clause I think, frankly, appears to be spurious." It makes no sense for the court to rule the petitioners' argument was spurious, i.e. lacking validity, since denying their requests for discovery deprived them of their only means to prove their argument.

C. The court's failure to provide notice of trial, its disregard of court rules, and the lack of time afforded the petitioners to present their case, resulted in a due process violation against *pro se* litigants.

The presiding judge violated Washington State Court Rule LAR 0.4.1(b), Case Schedule Order and Assignment of Civil Cases, which says

> (b) . . . Excluding cases listed in LAR 0.4(a)(1), the clerk will issue and file a Case Assignment Notice and Order with a status conference date and will provide one copy to the party filing the initial pleading and one copy to the assigned court department. The plaintiff/petitioner may serve a copy of the Case Assignment Notice and Order on the defendants/respondents along with the initial pleadings. Otherwise, the plaintiff/

> petitioner shall serve the Case Assignment Notice and Order on the defendants/ respondents within ten days after the later of: (1) the filing of the initial pleadings, or (2) service of the defendant's/respondent's first response to the initial pleadings whether that first response is a notice of appearance, an answer, or a CR 12 motion. The Case Assignment Notice may be served by regular mail, with proof of mailing to be filed promptly in the form required by CR 5.

The presiding judge of the superior court heard the show cause hearing. At this hearing, in response to the petitioners' request for a trial, the court responded a "trial would be six to nine months out" and the court believed that would be "way too long." The court determined that it was unable to complete the hearing that day, and continued the show cause hearing via a written order that specifically stated the show cause hearing was continued until 12 days later. When the petitioners appeared 12 days later before a different judge, petitioners conducted the hearing believing it was the show cause hearing continued by the presiding judge. They did not realize until after the trial was over that they had just defended themselves at trial. And how would they know? The presiding judge earlier clearly said "I am not going to set this for trial." The court issued a written order that continued the show cause hearing. Nothing the court said or did provided notice to the petitioners that they would be conducting a trial in 12 days. This is significant because the standard of proof

required to defeat a show cause motion for specific performance is lower than proof required at trial. It is not reasonable to expect a *pro se* litigant to adequately prepare for a trial without any notice. The failure to provide notice to the petitioners of the pending trial prevented them from adequately accomplishing any trial preparation.

These omissions are significant due process violations. If the court had followed its own rules, a status conference would have been held. In addition to discussing other regular trial matters, a trial date would have been set, and discovery would have been scheduled. The court's failure to follow this rule greatly prejudiced the petitioners as it directly resulted in their failing to receive notice of trial, which prevented them from preparing a defense.

LAR 0.4(a)(1) says,

> General Civil. 90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months; and the remainder within 24 months, except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review will occur.

During the trial, which lasted approximately six hours, the judge made no less than eight references to not having enough time to complete the trial. A few examples of these time references are: "Davey: You were actually – I need just a couple of minutes. I was

just given this document. I haven't got quite through it . . . Trial Brief. Court: I have read it and I was handed it later than you were." Report of Proceedings pg. 1. "We are running out of time. And – I know we are going to . . . need time for the argument." RP pg. 79. "Davey: May I confer with my wife for a moment before we start? Court: I'm just telling you we are running out of time." RP pg. 80. "Court: We're running out of time, sir. Do you have anything else? RP pg. 163. "Davey: Okay. How much time do we have? Court: About an hour . . . Davey: Okay. Court: Are you done asking him questions? Davey: I need, I have a few more, I need to testify, then I have to ask questions about what I testified to. If he could – maybe – Mr. Pratt can make his answers a little shorter, a littler more on point to the direct, maybe we can move a little quicker. Court: Ask your questions." RP pg. 170.

Many trials last days, weeks, even months. The petitioners' trial lasted about six hours. The petitioners' trial was no less important than any other. In light of the court's stated goal that 90% of civil cases being tried or otherwise concluded within 12 months, it was unfair and unnecessary for the trial judge to continually push the petitioners to hurry. More significantly, the court's actions prejudiced the petitioners' ability to effectively conduct their defense. This is another clear violation of due process.

In the case now before this Court, the most fundamental state court procedures designed to protect a litigant were so abused that the trial resulted in a

total absence of Constitutional fairness. This happened solely because the petitioners were *pro se*. By granting Certiorari, this Court can establish a constitutional standard that will provide strict guidelines for all state courts to follow regarding civil *pro se* litigants' right to meaningful access to the courts, trial notification, preparation time, and discovery, as guaranteed by our Constitutional due process rights.

II. This Court has not addressed the standard for determining when judicial bias against a *pro se* party amounts to a due process violation.

A. *Pro Se* litigants possess a due process right of judicial impartiality.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Indeed, a "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). It is well-established that "our system of law has always endeavored to prevent even the *probability* of unfairness." *Id.* (emphasis added). This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the

appearance of justice." *Id.* (internal quotation marks omitted).

This constitutional prohibition upon adjudication by judges tainted by a probability of bias should apply with equal force to *pro se* litigants in a civil setting. There is no question that *pro se* civil litigants possess a due process right of access to the courts and that the right to judicial impartiality is inherent to this right of access.

Although the Court has addressed judicial bias on several occasions, the Court has so far not addressed whether a *pro se* litigant must show actual bias or objective bias in order to prove a due process violation. The Court's guidance is therefore needed and review is warranted.

B. The question of judicial bias against a *pro se* party is important for the entire judiciary system.

The right of access to the courts has historically been recognized as vital to both citizens and the judiciary as a whole. In *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907), this Court wrote that:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of an orderly government. It is one of the highest and most essential privileges of citizenship,

> and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

The due process right to judicial impartiality is equally important.

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, 446 U.S. 238, 242 (1980).

The question of the standard for judicial impartiality against a *pro se* party is also important because of the regularity with which judges interact with *pro se* litigants. Due to the recession and high cost of legal fees, *pro se* representation has increased substantially over the last decade. State statistics continue to bear out this trend. Consider for example:

- In Utah, for divorce cases, 49 percent of petitioners and 81 percent of respondents were self-represented (Committee

on Resources for Self Represented Parties, "Strategic Planning Initiative: Report to the Judicial Council," July 25, 2006).

- In New Hampshire, one party is *pro se* in 85 percent of all civil cases in the district court, and 48 percent of all civil cases in superior court are *pro se* ("Challenge to Justice – A Report on Self-Represented Litigants in New Hampshire Courts – Findings and Recommendations of the New Hampshire Supreme Court Task Force on Self-Representation," January 2004).

- In California, in a survey of *pro se* assistance plans submitted to the Administrative Office of the Courts by 45 counties, the *pro se* rate of family-law cases overall averaged 67 percent. In the larger counties, the average was 72 percent. In domestic-violence restraining-order cases, litigants are reported to be *pro se* over 90 percent of the time (Bonnie Rose Hough, "Description of California Courts Programs on Self-Represented Litigants," June 2003).

- In Chicago alone there are thousands of cases each day which involve *pro se* litigants. Chicago Daily Law Bulletin, "Big Jump In Pro Se Cases," April 25, 2009.

- In 1993 53% of the family law cases in Des Moines, Iowa were *pro se* and in

> Washington D.C., 88% were. (Woo, "The Lawyerless: More People Represent Themselves in Court, But is Justice Served?", Wall Street Journal, August 17, 1993, at 1.)

With the influx of *pro se* litigants comes increased possibility of judicial bias against them. The Court should address this question now and provide trial and appellate courts with needed guidance rather than allowing the issue to percolate further.

C. The court of appeals' decision conflicts with decisions from this Court and is erroneous.

The court of appeals' decision countenancing the trial court's actions conflicts with relevant decisions of this Court holding that *due process requires judicial impartiality. See e.g., Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955).

This Court's review is also warranted because one standard must be set for judicial bias against *pro se* litigants. That standard must be the same as that for possible bias rather than actual bias in order for *pro se* litigants to receive their fundamental right to a "fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136. It is often exceptionally difficult – if not wholly impossible – to present conclusive proof that a judge is subjectively biased. Indeed, it is extraordinarily rare for a judge to acknowledge that he harbors a bias against a litigant. *See Crawford v. United States*, 212

U.S. 183, 196 (1909) ("Bias . . . might exist in the mind of one . . . who was quite positive that he had no bias"). And it is nearly equally rare for *pro se* litigants to be afforded the opportunity for discovery to obtain evidence of a judge's bias because the availability of discovery generally rests in the "sound discretion" of the judge whose impartiality is being challenged. *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997).

As in this case, then, most *pro se* petitioners must rely solely on the publicly available facts about a judge. In light of this evidentiary hurdle, the right of *pro se* litigants to a fair trial before an unbiased judge can only be vindicated by mandating recusal where these publicly available facts create an objective "probability of actual bias on the part of the judge." *Withrow v. Larkin*, 421 U.S. 47 (1975); *see also Murchison*, 349 U.S. at 136. A requirement that a *pro se* litigant seeking a judge's recusal while having to conclusively establish the existence of judicial bias would eviscerate the procedural protections afforded by due process and relegate *pro se* parties to trial before judges who harbor a strongly suspected (but unprovable) bias against them.

For this reason, the Court has repeatedly recognized that, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a *possibility* of judicial bias creates a constitutionally unacceptable risk of *actual* bias. *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality op. of Marshall, J.); *see also Tumey*, 273

U.S. at 532; *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 825 (1986). Such a standard should equally apply to possible bias against civil *pro se* litigants.

Applying the objective standard to this case easily produces a finding of bias. First, when this case was eventually docketed for trial, the court failed to apply the standard case management schedule. Rather than apply the customary rules in place, the court rushed the *pro se* petitioners into a trial without notice. The court also denied discovery without reason, even though petitioners had requested it no less than nine times. The court transformed a show cause hearing into the trial despite the unfairness of forcing the *pro se* petitioners to defend themselves without preparation. At the trial, the court continually rushed the *pro se* petitioners. In doing so, the court repeatedly stated that he was "running out of time." *See supra*, at 16. It is abundantly clear that the court was increasingly impatient with the *pro se* litigants. In fact, when ruling against the petitioners, the court chided them for the basis of their defense.

The trial court actions were a result of a bias against the petitioners because they were *pro se*. It could be argued that if the court had committed one or even two errors of law or judgment then the court was simply fallible, or worse, incompetent. But when a court so far departs from accepted judicial norms, the actions must rightly be viewed as judicial bias. Here the court's actions were clearly a result of bias against the *pro se* petitioners, and these actions violated petitioners' rights to judicial impartiality

under the due process clause. Therefore, review is warranted.

III. At a minimum, the Court should grant summary disposition.

Although plenary review is warranted for the reasons stated above, at a minimum the Court should "GVR" – grant the petition, vacate the judgment below, and remand the case for reconsideration in light of the Court's Due Process jurisprudence. This Court has noted that in appropriate cases,

> a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam) (quotation and citation omitted). In *Youngblood v. West Virginia*, this Court issued a GVR where the lower court failed to consider a federal due process claim that discovery had been erroneously withheld. 547 U.S. 867 (2006). There, the Court noted that if it was to reach the merits of the case, "it would be better to have the benefit of the

views of the full Supreme Court of Appeals of West Virginia" on the due process/discovery issue. *Id.*

A GVR is appropriate "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167. That standard is met here.

In this case, petitioner raised a due process violation before the state court of appeals. The lower court failed, however, to address it. While the importance of the issue counsels for plenary review, the Court's standard procedure is to allow the state court another opportunity to address the constitutional issue in the "first instance." *Fellers v. United States*, 540 U.S. 519, 526 (2004). The Court should therefore, at a minimum, issue a GVR order.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES & DANA DAVEY
Pro Se Petitioners
3720 W. Rosamond Ave.
Spokane, WA 99224
(509) 879-7454

The Court of Appeals
of the
State of Washington
Division III

ROBERT L. PRATT, et ux., Respondents, v. JAMES DAVEY, et ux., Appellants.	)	No. 26620-6-III COMMISSIONER'S RULING (Filed Nov. 21, 2008)

James and Dana Davey appeal the Spokane County Superior Court judgment that awarded Robert and Sharon Pratt specific performance of a real estate agreement for the purchase of the Daveys' home. Among other things, the Daveys argue that the superior court misinterpreted the terms of the agreement. In their view, the Pratts violated the agreement when they did not tender their earnest money immediately upon their acceptance of the Daveys' counteroffer. And, they contend the Pratts did not deliver or fax their acceptance of the counteroffer to the office of the Daveys' broker, as the agreement required.

The Pratts move to affirm the judgment on the merits. *See* RAP 18.14. The Daveys counter that their appeal presents an issue of first impression, and a panel of judges should decide it.

It is well recognized that an appellate court may uphold a trial court's ruling on appeal on "any basis

supported by the record." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997) (quoting *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991)). Because the undisputed evidence reflects that the Daveys' conduct waived the alleged violations, the Court grants the Pratts' motion on the merits.

FACTS

On July 26, 2007, the Pratts offered the Daveys $260,000 to purchase the Daveys' home at [Home Address Omitted], in Spokane, Washington. The Daveys had listed the house for sale at $266,000. The Pratts' Real Estate Purchase and Sale Agreement with Earnest Money Provision contained a handwritten notation that an earnest money amount of $1,000 was due "on acceptance" and that the closing agent would hold that amount. CP at 7.

On Saturday, July 28, 2007, the Daveys rejected the Pratts' offer. The Daveys counteroffered for the listed price of $266,000 and changed the sale price in the agreement to that amount. Their Windermere agent, Yvonne DeBill, faxed the counteroffer to the Pratts' agent, Kathi Pate.

The Pratts accepted the counteroffer that same day by initialing the changes the Daveys had made to the agreement. Ms. Pate delivered the Pratts' acceptance of the Daveys' counteroffer to the Daveys' listing agent, Ms. DeBill. It was not until three days later – Tuesday, July 31, 2007 – that the Pratts

delivered an earnest money check for $1000 to Ms. Pate. The closing agent, Charles Carroll, did not receive the earnest money – until August 1, 2007.

At a subsequent hearing, Ms. Pate testified that in her experience in handling earnest monies, "once we had acceptance, acceptance occurred on a weekend, so that rolled over to the following business day. At which point that would have been – I had two days from that business day in which to receive the earnest money check. I received it on the second day, which would have been the 31st, and submitted it to our processor." RP at 51.

But the parties' agreement provided not only that the earnest money was due on acceptance, to be held by the sellers' closing agent, it also included provisions that "time [was] of the essence" and that "[o]ther than any time periods or ending dates provided in section 10 [acceptance of offers and counteroffers], if the last day is a Saturday [or] Sunday . . . , then such period shall expire on the *next day* which is not a Saturday [or] Sunday. . . ." (Emphasis added.) Ex. 1 at page 4.

Ms. DeBill testified that she "immediately" notified James Davey that the Pratts had accepted their counteroffer. RP at 99. She stated, "[h]e was in Portland. And we did this over fax. And I called him back. To tell him it [the counteroffer] was accepted." RP at 99. Ms. DeBill testified that she had in her possession, at the time of the phone call, the document in which the Pratts had accepted the Daveys'

counteroffer. The superior court indicated that Ms. DeBill's possession of the initialed agreement, as the agent of the broker, complied with section 10 of the agreement. RP at 121. That section provided that "[a]n offer or counteroffer shall be considered accepted when a copy signed by all necessary parties has been delivered or transmitted by facsimile *to the office of the Broker* representing the last offering party, . . . which date shall be the date of Mutual Acceptance." (Emphasis added.) Ex. 1 at page 4.

Mrs. Davey disputed Ms. DeBill's testimony. In response to questioning by her husband, who represented the couple at the hearing pro se, she testified that they were "never informed by letter, by fax, by phone call, by any means, that the Pratts had accepted [their] offer." RP at 95-6.

On August 3, 2007, the Pratts went to look at the house. The Daveys were just leaving. Mr. Pratt testified, as follows:

> We were going to look at the house. And Daveys were there . . . actually looked like they were leaving at the time and trying to get out. So they had wrote us a letter. And they were going to tape it on the door, as they left. However, they hadn't left so he handed it to me and we had the opportunity to meet and discuss.
>
> Q. Did you discuss the content of the letter?
>
> A. Yeah, we did.

. . .

> A. . . . When the Daveys had given this to us, actually I had talked to Jim and shook his hand and we were kind of glad to see eye to eye. And he had a list of things that he wanted us to – to allow him to do. And so – *I made this clear that in our contract, we'd – we'd not checked the box and not requested it for professional inspection, so we weren't there to professionally inspect the place and come up with a list. . . . He felt that he wanted to do them, because – he wanted to turn the house over in good state. . . .*

(Emphasis added.) RP at 15-17. The court admitted as P-2 the letter referenced in the above testimony. It read, as follows:

> 8-3-07
>
> Dear Larry and Sharon –
>
> We are not home so come on in and spend as much time as you need. We planned to accomplish a number of repairs on the house prior to showing it, so here, in no particular order, is a list of what we had planned to do. Some of these you may already be aware of: [a list of 18 items]

Later, on the 25th or 26th of August, Ms. Pate received a phone call from Mr. Davey in which he stated he was upset with his realtor. She stated that he said he wanted to close on the property, but the dates were not working for him. She spoke on the phone again with him on the 27th, during which

conversation he stated he was not under contract. She disagreed.

Mr. Carroll called the Daveys to let them know that the closing was ready. Mr. Davey told Mr. Carroll he did not intend to close the sale. On September 12, 2007, the Pratts met with Mr. Carroll and completed their part of the closing.

THE LAWSUIT

On September 19, 2007. the Pratts filed a summons, complaint, and motion for order to show cause for specific performance of the sale agreement. The superior court heard the motion for order to show cause on September 28, 2007. The court declined the Daveys' request to set the matter for trial because "trial would be six to nine months out and I think that's way too long." RP at 9. It continued the motion to show cause to October 10, 2007, so that the parties could present witness testimony.

At the hearing on October 10, 2007, the Pratts presented testimony from Mr. Pratt, Ms. Pate and Mr. Carroll. Mr. Davey represented himself and presented his and his wife's testimony. Mr. Davey argued the agreement had lapsed because it provided that "time is of the essence," *see* exhibit 1 at page 4, and the Pratts did not tender the earnest money in a timely fashion nor did they deliver their acceptance to the office of the seller's broker. The court called and questioned Ms. DeBill, the Daveys real estate agent.

In its oral ruling, the court found the agreement was a binding contract, and the Daveys had no excuse for not performing. The court cited the meeting of August 3rd. It stated, as follows:

> I have to tell you, in . . . 25 years on the bench, and . . . 11 years of doing [real estate] work, I have never heard anyone make an argument, ["]well I don't know if the date on here saying it's mutual assent of 7-28 is really, really correct. Because I think everyone is lying to me.["] I have never heard that clause attacked for that reason. Nor is it subject to attack. *It could have been, perhaps, if somehow, like about August 3rd, you said wait a minute, one, we didn't know we had an accepted offer on our counteroffer, and two, have reason to believe it really wasn't done on the 28th. We only get this kind of argument after there is a request for specific performance.*
>
> . . .
>
> . . . If someone comes up with your listing price, you can't refuse it. Okay. That's what you said you'd sell it for.
>
> . . .
>
> That gets to all of this stuff, which is dated 8-3 of '07, ["]dear Larry and Sharon.["] It's not to the realtors. It's to Larry and Sharon. Who supposedly bought the property. ["]We are not home so come on in and spend as much time as you need. We plan to accomplish a number of repairs on the house

> prior to showing it. So here, in no particular order, is a list of what we plan to do. Some of these you may be already aware of.[*]
>
> . . . But *it is significant, in that the 8-3-07 [letter], you are not home and invited these buyers to come in and spend as much time as they need.*

(Emphasis added.) RP at 126-29.

The superior court awarded the Pratts specific performance, attorney fees, and judgment in the amount of $100 a day from November 16, 2007, until the deed was recorded at the auditor's office. The Daveys appealed.

On December 21, 2007, the superior court heard the Pratts' motion for a supersedeas bond and the Daveys' motion for relief from judgment. The court ordered the Daveys to post a supersedeas bond in the amount of $80,000. It also granted the motion for relief from judgment insofar as it amended the judgment to award the Pratts $100 a day until the Daveys signed and delivered the deed to the closing attorney. The Daveys, now represented by counsel, told the superior court that they had delivered the deed to the closing attorney by the date of the December 21st hearing. At oral argument in this Court, counsel advised that the signed deed has remained with the closing attorney pending the appeal here.

ANALYSIS

1. Existence of a Contract.

First, the Daveys assert that the Pratts failed to deliver their acceptance to the office of the Daveys' broker and did not tender the earnest money at the time of acceptance, as the agreement required. Since the agreement also provided that time was of the essence, the Daveys argue that these violations prevented the formation of a contract. And, therefore, the superior court erred when it ordered the Daveys to specifically perform the agreement.

The Daveys' argument ignores their conduct on August 3rd, when the parties met at the Daveys house. That conduct waived the above provisions in the agreement. While the Daveys' appellate counsel argues that the Daveys' conduct on August 3rd did not constitute a *knowing* waiver of the terms of the agreement, he ignores Mr. Pratt's testimony about what he stated to the Daveys at the house on August 3rd. Mr. Pratt testified that he "made this clear that *in our contract*, we'd – we'd not checked the box and not requested it for professional inspection. . . ." (Emphasis added.) RP at 17. The Daveys did not present any testimony at the hearing to dispute Mr. Pratt's version of what he said at that meeting. If the Daveys believed no agreement had been reached, they should have stated that belief to the Pratts on August 3rd, in response to Mr. Pratt's reference to "our contract." Indeed, the fact that the Pratts were coming to look at the house without their realtor

should have prompted some inquiry on the part of the Daveys, if they were unaware that the Pratts had accepted their counteroffer.

Whether the Daveys subjectively intended *not* to waive the earnest money and delivery portions of the written sales agreement or the contractual provision that time was of the essence, is irrelevant. As the beneficiary of those provisions, it was the Daveys' responsibility not to mislead the Pratts that a contract existed, if they intended to stand by those provisions. *Cf. Swenson v. Lowe*, 5 Wn. App. 186, 188, 436 P.2d 1120 (1971) ("[T]he requirement of a writing is for the benefit of the owner, and the owner, either expressly or by conduct, may waive such a requirement."). Instead, they waited another twenty four days before they advised the Pratts' realtor that they did not consider themselves bound by the agreement.

Although this Court found no Washington case involving waiver by conduct of terms in a real estate purchase agreement, *Swenson*, 5 Wn. App. at 188, recognizes the general proposition that a party's conduct may constitute waiver of contractual terms benefiting that party. And no persuasive argument exists that this general proposition should not apply in real estate sales contracts. The Court notes that other jurisdictions have applied the general proposition identified in *Swenson* to real estate sales contracts – even real estate sales contracts that provide that time is of the essence. *See Barnes v. Brown*, 193 Ill. App.3d 604, 550 N. E.2d 34, 38, 140 Ill. Dec. 552 (1990); *Shoreham Developers, Inc. v. Randolph Hills,*

Inc., 248 Md. 267, 235 A.2d 735, 741 (1967); and *Strong v. Jolley*, 378 S. W.2d 344, 346 (Tx. Ct. App. 1964).

Consequently, the superior court did not err when it ordered specific performance. The Daveys' conduct waived strict compliance with the earnest money provision. And, even if the Pratts' delivery of their acceptance to the Daveys' realtor did not comply with the provision requiring delivery to the broker, the Daveys' conduct waived strict compliance with that provision as well.

2. Statute of Frauds.

Second, the Daveys argue that the purchase and sale agreement violated RCW 19.36.010, which requires that "an agreement . . . employing an agent . . . to sell . . . real estate," be in writing. In support of that argument, they cite the fact they did not receive a copy of the Pratts' acceptance of their counteroffer until September 13, 2007.

The agreement here was in writing. *See* Exhibit 1. The Daveys' agent, Ms. DeBill, testified that she had the agreement accepting the Daveys' counteroffer in her possession the same day the Pratts' initialed it. As the Daveys' agent for the sale, delivery of the acceptance to her constituted delivery to her principals. Nothing in the facts supports finding a violation of RCW 19.36.010.

3. Discovery Request.

Third, the Daveys argue that the superior court abused its discretion when it scheduled the Pratts' motion for order to show cause for October 10th and did not continue it for trial. According to the Daveys, this timeline effectively prevented discovery. The only specific example they give to support their argument that they suffered prejudice is that they did not have time to obtain the Pratts' phone records to show that their acceptance of the counteroffer did not occur before the counteroffer expiration date.

The Daveys' argument that the lack of discovery prejudiced them fails for the same reason their argument resisting specific performance fails. They waived strict compliance with the formation terms of the sales agreement when their conduct objectively indicated their intent to proceed with the sale. Thus, any evidence that the Pratts did not accept the counteroffer before the expiration date would not relieve the Daveys of their agreement to sell. They effectively waived that provision by their subsequent conduct.

4. The Superior Court's Examination of Ms. DeBill.

Fourth, the Daveys argue that the superior court abused its discretion when it called Ms. DeBill as a witness. They recognize that the superior court may call a witness on its own initiative. ER 614(a); *Ramsey v. Wading*, 36 Wn.2d 303, 310, 217 P.2d 1041

(1950). And, the superior court has broad discretion to question a witness about the subject of the parties' dispute. *Jarrard v. Seifert*, 22 Wn. App. 476, 478, 591 P.2d 809 (1979) (The trial court did not abuse its discretion when it examined a witness to clarify an inconsistency in the testimony). But they contend the fact that Ms. DeBill had been in the courtroom for the testimony of the other witnesses prejudiced them.

Here, the court called Ms. DeBill and asked her questions about her interaction with the Daveys during the evening on which the Pratts accepted the Daveys' counteroffer. The court also asked Ms. DeBill about the contents of a letter she received from Mr. Davey about a month later. Since an issue in this case was whether the Pratts timely accepted the counteroffer, the court's inquiries were appropriate. *See Jarrard*, 22 Wn. App. at 478. And, Mr. Davey had the opportunity to cross-examine Ms. DeBill, thus satisfying the requisites of due process.

Nor have the Daveys shown how Ms. DeBill's presence in the courtroom during the testimony of the other witnesses prejudiced them in defending the Pratts' lawsuit. The parties did not dispute that Ms. DeBill acted as the Daveys' agent, or that the Pratts' agent communicated with Ms. DeBill during the sale negotiations. Whether Ms. DeBill kept the Daveys informed of all material aspects of those negotiations may raise an issue pertaining to performance of her duties to her clients, but it is not material to the Pratts' right to rely upon her as the Daveys' spokesperson. In any event, the evidence supports a finding

that the Daveys' conduct objectively manifested that the parties had an agreement.

5. Money Damages.

Fifth, the Daveys assign error to the superior court's award of $100 a day damages to the Pratts between November 16th and the date the Daveys delivered the deed to the closing agent. Appellate review of damage calculations is limited to whether they are supported by substantial evidence. *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wn. App. 350, 359, 944 P.2d 1093 (1997), *aff'd*, 137 Wn.2d 427, 971 P.2d 936 (1999). A damage award must thus fall within the range of relevant evidence. *Id.*; *see also Ferrell v. Cronrath*, 67 Wn. 2d 642, 645, 409 P.2d 472 (1965).

The Daveys contend the record does not reflect how the superior court arrived at the $100 a day figure. But, the Pratts presented evidence that they had to secure substitute housing at a rate of $70 per day and incurred increased fuel expenses for their vehicles as a result of the Daveys' refusal to honor their agreement. The evidence is sufficient to support the court's award.

6. Attorney Fees.

Finally, both parties to this appeal request attorney fees pursuant to the agreement, which provides that "[i]f Buyer, Seller, or any real estate licensee or broker involved in this transaction is

involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorney's fees. This provision shall survive Closing." Exhibit 1 at page 5. The Pratts have prevailed in this appeal, and are therefore entitled to their attorney fees.

Accordingly,

IT IS ORDERED, the Pratts' motion on the merits is granted and the superior court's judgment is affirmed. The Pratts are awarded their reasonable attorney fees on appeal, contingent upon their compliance with RAP 18.1(d).

November 21, 2008

/s/ Monica Wasson
Monica Wasson
Commissioner

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON IN AND
FOR THE COUNTY OF SPOKANE

ROBERT L. PRATT, et ux Plaintiffs, v. JAMES DAVEY, et ux Defendants.	))))))))	No. 07-2-04300-9

ORAL RULING OF THE COURT:

HEARD BEFORE: The Honorable Robert D. Austin

DATE: October 10, 2007

APPEARANCES:

FOR Plaintiffs: Linwood D. Sampson
Attorney at Law
1201 North Ash, St., Ste. 200
Spokane, WA. 99201-2801

FOR Defendants James R. Davey
Pro Se
[Home Address Omitted]
Spokane, WA 99224

[2] THE COURT: Thank you. First of all, the three elements of a contract aren't offer, acceptance, and time is of the essence. I know you haven't been to law school and had a basic course in contract law. The three elements of any contract are offer, acceptance and consideration. Okay.

Consideration can be a promise for a promise. It can be a mutual agreement and, of course, it can be the money. Since here we've got a promise for a promise, and if that's all you had, that's when the contract is executory. That means it's yet to be performed on. We don't have an executory contract. We have consideration. Not only the earnest money and the mutual – the accepting of the mutual acceptance, which is promise for promise. And there is a time of the essence clause. That is developed by case law in the United States, not common law. But it had to do with, when is the time for performance. And it is the final performance of the entire promise for a promise and other terms of the contract. So I'm only mentioning these contract terms for you.

I have been on the bench for 25 years and before that, I spent eleven years in private practice doing a lot of real estate closings and doing a lot of real estate litigation. I think I have a pretty fair understanding of – this is a mutual listing contract for Spokane County. [3] It used to be only one page. And it seems about every five years we add another page to it, basically because there is something that occurs, and brokers want to make sure that they have adequately covered everything. I have to tell you, in the 25 years on the bench and the 11 years of doing the work, I have never heard anyone make an argument "well I don't know if the date on here saying it's mutual assent of 7-28 is really really correct. Because, I really think everybody is lying to me." I have never heard that clause attacked for that reason. Nor is it subject

to attack. It could have been perhaps if somehow, like about August 3rd, you said "wait a minute, one we didn't know we had an accepted offer on our counter-offer, and two, I have reason to believe that it really wasn't done on the 28th." We only get this kind of an argument after there is the request for specific performance.

So looking at exhibit, this is P-1, which is the signed contract. First of all, it is an acceptance by the buyer of a counter offer of the sellers for the listing price. Okay.

What is significant about that? If someone comes up with with your listing price, you can't refuse it. Okay, that's what you said you'd sell it for. There are other terms and conditions that are changed and are negotiated, those things you can object to.

[4] This contract appears on its face to be a binding contract on both sides, for a purchase price of $266,000. And a thousand dollars earnest money to be given to the closing agent, by check. Or cash. On acceptance. The closing agent is Mr. Carroll. It wasn't going to be handed to Mr. Carroll on the date that this was mutually accepted, a Saturday night. But it was given to the closing agent. And it was after acceptance and it was by check. And apparently it cleared. To attack that clause I think, frankly, appears to be spurious.

One of the changes was the change of the closing agent – I'm trying to read this: Ashenbrener, is that what it said? There is another lawyer and that was

changed to Hackney and Carroll, attorneys. And the closing date was also changed from 9-5 to 9-30. There was another change that was circled and initialed by all parties referring to a roof by a licensed contractor. That was changed to by seller for consideration to the seller. Initialed by all four parties, husband and wife.

The letter to Ms. DeBill as I read it, primarily is Mr. and Mrs. Davey's dissatisfaction with her as the broker, not particularly with this contract. Things about calling the licensing authority really refer to the other contract that they have which is the listing contract with Ms. DeBill. And there is a dissatisfaction with the way [5] the property was marketed, although it sold within three days of being placed on the market. Those, I'm really not going to address. If you feel you still have some cause of action or complaint against Ms. DeBill, you're certainly free to follow that.

But I look at this contract. I look at the testimony that we have. The testimony is that as the negotiation – this was the original offer 7-25 by the buyers to the seller, which was not accepted by the sellers. A counter offer was proposed on the 28th where the purchase price was changed from $266,000, the amount of the earnest money remained the same, was not changed. It was signed and initialed on 7-28 as is shown on the contract. That's when the sellers made the counteroffer. And that's when not only the buyers, Mr. and Mrs. Pratt, said they signed it, but that is also when their agent said they signed it. Now, you asked at 6:10 p.m. if Ms. Tate could tell you where

she was. She said no. And yes, Ms. Tate, the point is this, they have no reason to lie to you as near as I can tell. They want the commission. The idea of the carpet is they're willing to pay out of their commission to make sure this deal goes through because you didn't want to have a professional cleaner, or whatever.

That gets to all of this other stuff, which is dated 8-3-07, "Dear Larry and Sharon." It's not to the realtors. [6] It's to Larry and Sharon who supposedly bought the property. "We are not home so come on in and spend as much time as you need. We plan to accomplish a number of repairs on the house prior to showing it. So here, in no particular order, is a list of what we had planned to do. Some of these, you may already been aware of." That was attempted to become an addendum. It fell short over the carpet cleaning. But it is significant, that on 8-3-07, you're not home and inviting these buyers to come in and spend as much time as they need.

I believe there is a valid binding contract. It meets all the essential terms of the real estate contract. And the sellers have no excuse for not performing.

Now whether their attacking the veracity of the dates that are contained on the contract has to do with sellers remorse, I don't know. Is it they're upset because they don't like Ms. DeBill? I don't know. Doesn't really matter. The point is there's a binding contract between the parties. And I would order that

the Daveys go ahead and sign. If they fail and refuse I'll appoint a master to sign on their behalf.

Now, as to damages: The Pratts are entitled to attorney fees pursuant to the contract. And I don't know how much time you have? I haven't seen an affidavit of attorney fees. Maybe you're not asking for them.

[7] As to the the Pratts' damages: You have been denied possession from I believe it's September 15th. That was the closing date, was it not?

MR. PRATT: The 14th, but we didn't – we considered the 17th. I think the week end was occurring.

THE COURT: Sharon on the four hours per day, $10 per hour, is that transportation for the kids?

MR. PRATT: No, she works as a para-professional and – because of transportation for the kids she was not able to, she's not been able to work.

THE COURT: Okay. I think Mr. Davey is entitled to examine you on the issue of damages. And I will set that over for further hearing. It – at first blush, for 25 days, that's a lot of damages that I'm not sure you can justify. But – we will set that for additional hearing.

All right.

Your order should include costs and attorney fees, court costs. Thank you.

MR. SAMPSON: Thank you, Your Honor, very much.

THE COURT: I would make a further comment that failing to give a copy of the executed contract to the Daveys by the listing broker is poor practice. To say that she has it in her office, on their behalf, does not satisfy that requirement. They should give a copy to the Daveys, although I do find the Daveys had notice of the sale.

[8] THE BAILIFF: Mr. Davey, you're asking for a date for presentment. November 2nd at 2:00.

(Matter Concluded).

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

ROBERT L. PRATT and SHARON PRATT, husband and wife, Plaintiff, vs. JAMES DAVEY and DANA DAVEY, husband and wife, Defendant.	Case No.: 07204300-9 JUDGMENT FOR PLAINTIFF

THIS MATTER was tried to the Court without a jury on October 10th and 11th, 2007. The undersigned Judge, Robert D. Austin, presided at the time of trial. Plaintiffs appeared in person and were represented by their attorney of record Linnwood D. Sampson. Defendants personally appeared and represented themselves Pro Se, through Defendant James Davey.

The Court received the evidence and testimony offered by the Parties, considered the pleadings filed in the action and heard oral argument of the Plaintiffs Counsel and from Defendant James Davey. On November 16, 2007 the Court issued its oral opinion. On October 15th, 2007 the Court made Findings of Fact and Conclusions of Law which have been entered in this matter.

Consistent with the oral opinion and the Findings of Fact and Conclusions of Law entered in this matter the Court enters final judgment as follows:

1. Defendants are ordered to meet with Charles V. Carroll, as closing agent, and sign all documentation prepared by him as required to complete the closing of the sale of the property at [Home Address Omitted], Spokane, Washington, to Plaintiffs Larry and Sharon Pratt.

2. Further, on the expiration of 10 days from the date of the filing of this judgment with the clerk of the Spokane County Superior Court, if Defendant have not met with the closing agent Charles V. Carroll for the purpose of signing all documents to complete the closing of the subject property, then in that event, upon declaration of the closing agent Charles V. Carroll as to Defendants failure to meet and sign the closing documents, then, as provided in Civil Rule 70 of the Rules for Superior Court of the State of Washington, the Court will sign an order appointing the Ex Parte Court Commissioner of the Spokane County Superior Court with authority to sign all documents necessary to complete the closing.

3. Plaintiffs are awarded judgment against Defendants in the amount of $5,083.33 for damages suffered by Plaintiffs from September 14, 2007 through November 15, 2007 as a result of Defendants failure to sign the necessary documents to complete the closing.

Additionally, Plaintiffs are awarded judgment against Defendants in the amount of $100.00 per day for each day after November 15, 2007 until the date that the deed conveying ownership of the residence at [Home Address Omitted], Spokane, Washington from Defendants to Plaintiffs is recorded at the Spokane County Auditor Office

4. Plaintiffs are awarded judgment against Defendants for attorney fees and court cost incurred in this matter in the amount as follows:

i)	Attorney Fees	$5,920.55
ii)	Costs	$ 324.55

5. The closing agent is ordered to withhold and pay to Plaintiffs from the sale proceeds of the home to be paid to Plaintiffs a sufficient amount to satisfy the judgments entered in this matter.

DATED this 15th day of November, 2007.

/s/ Robert D. Austin
ROBERT D. AUSTIN
SUPERIOR COURT JUDGE

Presented by:

/s/ Linnwood D. Sampson
Linnwood D. Sampson
WSBA 6107
Attorneys for Plaintiff

Read and approved as to content and form and Notice of Presentment is waived

/s/ J. R. Davey
James Davey

/s/ Dana Davey POA
Dana Davey

COURT OF APPEALS, DIVISION III,
STATE OF WASHINGTON

ROBERT L. PRATT, et ux., Respondents, v. JAMES DAVEY, et ux., Appellants.	))))))	No. 26620-6-III ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

Having considered appellants' motion to modify the commissioner's ruling of November 21, 2008, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

DATED: February 6, 2009

FOR THE COURT:

/s/ John A. Schultheis
JOHN A. SCHULTHEIS
CHIEF JUDGE

THE SUPREME COURT OF WASHINGTON

ROBERT L. PRATT and SHARON PRATT, husband and wife, Respondents, v. JAMES DAVEY and DANA DAVEY, husband and wife, Petitioners.	NO. 82851-2 **ORDER** C/A NO. 26620-6-III

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Owens and J. Johnson, considered at its September 8, 2009, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied and the Respondent's request for attorney fees is granted. The Respondent is awarded reasonable attorney fees and expenses pursuant to RAP 18.1(j). The amount of the attorney fees and expenses will be determined by the Supreme Court Clerk pursuant to RAP 18.1. Pursuant to RAP 18.1(d), Respondent should file an affidavit *with the Clerk of the Washington State Supreme Court*.

DATED at Olympia, Washington this 8th day of September, 2009.

For the Court